

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2001-504-E - ORDER NO. 2002-133

FEBRUARY 27, 2002

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| IN RE: Application of Cherokee Falls Development |) | ORDER ADDRESSING |
| Company, LLC for a Certificate of |) | MOTION FOR |
| Environmental Compatibility and Public |) | EXTENSION OF TIME |
| Convenience and Necessity to Construct and |) | TO FILE PREFILED |
| Operate a Generating Plant in the Vicinity of |) | TESTIMONY |
| Gaffney, SC, and to be known as the |) | |
| Cherokee Clean Energy Center. |) | |

This matter comes before the Public Service Commission of South Carolina (the Commission) by way of a Notice of Motion and Motion for Extension of Time to File Prefiled Testimony (Motion) and by way of an Amended Notice of Motion and Motion for Extension of Time to File Prefiled Testimony (Amended Motion) from the Department of Health and Environmental Control (DHEC). These matters were addressed by the Commission at its regularly scheduled meeting on February 26, 2002.

On December 21, 2001, Cherokee Falls Development Company, LLC (Cherokee) filed an Application with the Commission for a Certificate of Environmental Compatibility and Public Convenience and Necessity to Construct and Operate a Generating Plant in the vicinity of Gaffney, South Carolina. On January 16, 2002, the Commission issued Order No. 2002-25 which established prefiling deadlines for the instant docket. Order No. 2002-25 directs the Commission Staff and intervenors to prefile their testimony on or before February 25, 2002. Additionally, Order No. 2002-25 requires any rebuttal testimony and exhibits of Cherokee to be filed with the Commission

on or before March 4, 2002, and any surrebuttal testimony and exhibits of the Commission Staff and intervenors to be prefiled on or before March 6, 2002.

On February 22, 2002, DHEC filed a Notice of Motion and Motion for Extension of Time to File. In this Motion, DHEC requested an extension of time to file prefiled testimony in order to prepare prefiled testimony addressing Commission Staff inquiries regarding the permit process, the status of permit applications, and related issues. Additionally, DHEC alleged that it anticipates offering testimony from three or four employees of the Bureaus of Air Quality and Water and, therefore, seeks to file its prefiled testimony on Friday, March 1, 2002.

Upon receiving DHEC's Motion, Mr. Gary Walsh, Executive Director at the Commission, contacted DHEC to inquire about the specific Commission Staff inquiries which DHEC alleges as part of the basis of its Motion. During Mr. Walsh's discussions with DHEC counsel, Mr. Walsh learned that no specific Commission Staff inquiries were submitted to DHEC for response, and Mr. Walsh was informed that DHEC would soon be filing an amended motion.

On February 25, 2002, counsel for Cherokee filed a Return to DHEC's Motion for Extension of Time to File (Return). In its Return, Cherokee states that it believes DHEC was in actual receipt of Order No. 2002-25 (Order Establishing Prefiling Deadlines) approximately one month prior to the service of the instant Motion. Cherokee also alleges that DHEC is aware of and familiar with the Commission's procedures, having participated in a variety of matters before this Commission. Moreover, according to Cherokee, DHEC is aware of and familiar with the fact that the Commission's regular

agenda for its weekly meeting each Tuesday is posted at noon on the Friday preceding, and, thus, that matters to be considered by the Commission at its regular meeting scheduled for Tuesday, February 26, 2002, were required to be filed on or before noon on Friday, February 22, 2002. However, according to Cherokee's Return, DHEC waited until after noon on February 22, 2002, to file with the Commission's Executive Director, via facsimile, the instant Motion. According to Cherokee, DHEC did not serve Cherokee, or any other of the parties, with a copy of the Motion in the same manner it was filed with the Commission but, instead, served the Motion via United States Mail.

In its Return, Cherokee further opposed DHEC's Motion for numerous reasons. Additionally, Cherokee states that DHEC has failed to state any ground or justification for an extension of time within which it was ordered by the Commission to prefile its testimony in this case. Next, Cherokee alleges that DHEC lacks specificity regarding the basis of a purported need of information by the Commission Staff from DHEC. Cherokee also alleges that it would be materially prejudiced in the preparation of its case if DHEC's Motion is granted. Specifically, Cherokee asserts that if DHEC's request for an extension until March 1, 2002, is granted, it will be impossible for Cherokee to review DHEC's testimony, determine whether testimony in rebuttal thereto is required, determine whether Cherokee's own personnel or previously retained experts are competent to offer testimony in rebuttal thereto, retain additional experts, and prepare rebuttal testimony.

DHEC's Amended Motion was faxed to the Commission on February 25, 2002. In DHEC's cover letter attached to the Amended Motion, DHEC requested that the

Amended Motion be substituted for the Motion faxed to the Commission on February 22, 2002. As a basis for its Amended Motion, DHEC states that in addition to preparing testimony for the instant case, DHEC is also preparing testimony regarding the permit process, the status of permit application, and related issues pertaining to the Palmetto Energy Center application (Docket No. 2001-507-E) to be prefiled on March 4, 2002. Further, according to DHEC, in order to ensure that its testimony on these two projects is consistent, and to address issues which DHEC staff anticipates will be raised based on Commission questions in previous cases, DHEC staff requests an extension of time to prefile its testimony until Friday, March 1, 2002.

In its Return to Amended Motion, dated February 25, 2002, Cherokee stated it had received via facsimile transmission on February 25, 2002, DHEC's Amended Motion. Cherokee also incorporated by reference its Return to DHEC's prior Motion. Regarding DHEC's assertion that it needs an extension of time to prefile its testimony in the instant case to ensure that its testimony in the instant case is consistent with the testimony filed in Docket No. 2001-507-E, Cherokee states that these assertions provide no grounds for an extension. Additionally, Cherokee alleges that DHEC has long been aware of the prefiling of testimony deadlines in this docket and that DHEC is familiar with the Commission's procedures. Therefore, there is no basis to relieve DHEC from the obligations that all other parties of record are required to meet in this proceeding. Additionally, according to Cherokee, filing deadlines that DHEC has in another docket are irrelevant to the instant case, and any testimony that DHEC may intend to file in another case has no bearing upon the instant case. Cherokee raises several other grounds

that DHEC's Amended Motion should be denied, including DHEC's failure to set forth the nature of issues that it anticipates will be raised based on Commission questions in previous cases and how DHEC has determined such issues will be raised in this case. Finally, Cherokee alleges that if the Commission were to grant DHEC's Amended Motion on the basis of concerns arising in another case, Cherokee would be unduly prejudiced and denied due process and equal protection under the law.

We have reviewed the pleadings in this case. DHEC has asked for an extension of time to file its prefiled testimony until March 1, 2002. The Commission finds DHEC's participation in this proceeding desirous, and we find that the inclusion of prefiled testimony from DHEC would certainly be useful in the proceeding as the statutes governing siting require this Commission to consider the environmental impacts of a major utility facility prior to the certification of a major utility facility. However, the Commission finds that granting DHEC's request would unduly prejudice other parties in that DHEC's request does not allow the other parties in this case sufficient time to properly prepare rebuttal or surrebuttal testimony and an extension of this nature would not allow the other parties sufficient time to prepare for such late filed testimony and exhibits with the evidentiary hearing set to begin March 11, 2002. Therefore, DHEC's request for an extension to file testimony on March 1, 2002 is hereby denied. However, recognizing the usefulness of DHEC's participation in this proceeding and the potential for DHEC to provide salient, technically-based testimony, the Commission grants an extension for DHEC to prefile its testimony. We hereby grant DHEC an extension to file its prefile testimony with this Commission by the close of business on **February 27,**

2002. Further, DHEC's testimony shall be served on and in the hands of all parties on **February 27, 2002.**

In light of the extension of time granted to DHEC to prefile its testimony and exhibits, the Commission finds it necessary to modify the rebuttal and surrebuttal prefiling dates established by Order No. 2002-25. Therefore, any **rebuttal** testimony and exhibits of Cherokee shall be prefiled on or before **March 6, 2002**, and any **surrebuttal** testimony and exhibits of the Commission Staff and/or Intervenors, including DHEC, shall be prefiled on or before **March 8, 2002**. (Rebuttal testimony and exhibits and surrebuttal testimony and exhibits must be in the offices of the Commission and in the hands of the parties on these dates.)

Finally, we find that this Commission must address DHEC's filing of the original Motion in this case. It has been brought to the Commission's attention that DHEC's assertion in its original Motion that DHEC needed an extension of time to address PSC staff inquiries is false. Additionally, we are concerned that DHEC faxed its original Motion to the Commission on February 22, 2002, but DHEC did not provide Cherokee, or any other of the parties, with a faxed or hand-delivered copy of the Motion. Instead, DHEC served the Motion via United States Mail. Service in this manner is troublesome since DHEC was attempting to have the matter brought to the Commission during its regularly scheduled meeting set for Tuesday, February 26, 2002, yet DHEC did not attempt to provide other parties with the Motion in an expeditious manner.

We admonish DHEC's behavior in this matter. While we are concerned with DHEC not providing timely and expeditious notice to other parties of the Motion filed

with the Commission, we are particularly concerned with DHEC's inclusion of false grounds for an extension of time in its Motion. DHEC has participated previously in proceedings before this Commission, and DHEC has participated in legal proceedings in other legal forums. Therefore, DHEC should be aware of the rules and standards of practice before tribunals such as this Commission. DHEC is hereby notified that this Commission, in the future, will not tolerate DHEC disobeying the Commission's Rules of Practice and Procedure and applicable State law.

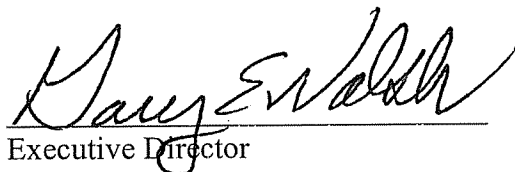
We further order that a copy of this Order be forwarded to each individual DHEC Board member and the Governor's Office.

This Order shall take effect upon issuance and shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:


Chairman

ATTEST:


Executive Director

(SEAL)